Supreme Court, U.S.
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In The

Supreme Court of the United States

BERNARD DOLENZ,

Petitioner,

vs.

NANCY VAIL,
EXECUTRIX OF THE DMITRI VAIL ESTATE,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals,
Fifth District Of Texas At Dallas

PETITION FOR WRIT OF CERTIORARI

BERNARD J. DOLENZ, pro se
#31480-077
6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220
bernarddolenz@att.net

QUESTION PRESENTED FOR REVIEW

DID THE COURTS BELOW VIOLATE AMENDMENT XIV, SECTION 1 BY DENYING PETITIONER EQUAL PROTECTION OF THE LAWS OF TEXAS IN NOT GRANTING A WRIT OF POSSESSION FOR PAINTINGS AND PERSONALTY OF DMITRI VAIL PURSUANT TO HIS VALID *PASSIVE-TRUST* OF AUGUST 29, 1989, DECLARING THAT IN A SEVERED DECLARATORY JUDGMENT ACTION, THAT SUCH "FINAL JUDGMENT" WAS RES JUDICATA IN THE PRIMARY ESTATE?

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OPINIONS BELOW

These are given in the appendix as I have not seen any published cites.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to do judicial review per 28 USC 1257 regarding Judgments from the Probate Court December 5, 2007; Fifth District Court of Appeals July 30, 2009 and its denial of the motion for rehearing August 6, 2009; Texas Supreme Court December 4, 2009, and its denial of the motion for rehearing January 22, 2010.

CONSTITUTIONAL PROVISIONS AND TEXAS PROPERTY CODE REGARDING *PASSIVE-TRUSTS*

Amendment XIV: Equal Protection Clause. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Texas Const. Art. 1, Section 19: Equal Protection Clause.

Trust Code 112.032(a): . . . title to real property held in trust vests directly in the beneficiary if the trustee has neither a power nor a duty related to the administration of the trust.

STATEMENT OF THE CASE

The Dmitri Vail Trust was created 8/29/89 (App. 23) before he married his fourth wife. Protracted litigation followed his death as to ownership of his paintings and personal effects. On 3/10/97 Judge Loving of Probate No. 3 held that the trust was valid and fully enforceable and that Bernard Dolenz owned all paintings, artwork, and personal effects that were owned by Dmitri Vail on 8/29/89 (App. 2). Since this was a *passive-trust*, the creation date and vesting date are the same, consistent with Property (Trust) Code 112/032. Wife No. 3, Patricia Anne Vail, obtained a severance for a Declaratory Judgment action to obtain 5 paintings granted to her in her divorce from Dmitri Vail, and was given another case number, 91-4696-P/3**(A)**. A Final Judgment was given in the Declaratory Judgment with only Wife No. 4 contesting the 5 paintings at issue. Judge Loving affirmed that Bernard Dolenz owned all of the property in fee simple absolute and indicated that the trust was *empty* at the time of Dmitri's death (App. 16). That the trust is empty is consistent with it being a *passive-trust*. The "Mother Hubbard" and "take nothing" clauses have been problematic to obtain possession of the trust corpus. Dolenz contends that these clauses are for this severed declaratory judgment action and are not res judicata as to the main estate case.

On Dolenz's "Motion to Take Possession . . . " Judge Loving indicated he had no jurisdiction on 6/22/05. His order was appealed to the Fifth District, who reversed and remanded the case back to him.

Judge Loving heard the Motion on 11/27/06; Nancy Vail failed to appear. A proposed order and a brief on res judicata were provided. Judge Loving promised to produce an order, even on his last day in office, but did not do so.

Judge Miller, who won the election from Judge Loving, ordered a New Trial "in the interest of justice and fairness," setting 8/21/07 for trial, with Nancy Vail receiving notice by certified mail, telephone, and by a process server. She failed to appear; evidence and testimony were produced with a proposed judgment. Judge Miller signed an Order Denying Second Motion to Take Possession on 10/5/07 (App. 8); on 10/29/09 Judge Miller heard Dolenz's Motion to Reconsider, made no response to that motion and made no response to requested Statement of Facts and Conclusions of Law. A timely appeal was made 1/4/08.

The Fifth District affirmed the Probate Courts Order 7/30/09 (App. 1), and denied a Motion for Rehearing 9/3/09 (App. 20). The Texas Supreme Court denied the Petition for Review on 12/4/08 and its Rehearing 1/22/10 (App. 21, 22).

SUMMARY OF THE ARGUMENT

The Statement of the Case above describes the protracted litigation with the Dmitri Vail Trust, created 8/29/86. Judge Loving's Interlocutory and "Final Judgment" reflect that Bernard Dolenz owns the paintings and personal property in fee simple

absolute on 8/29/86 when the trust was also created, and that the trust was *empty* at the time of Dmitri Vail's death. It is empty as the Dmitri Vail is a *passive-trust* because the trustee was not given affirmative powers and duties as Codified in Trust Code 112.032. In a dry trust, legal title is vested in the beneficiary at the time the trust is declared and becomes empty at that time. Judge Loving ruled that the trust was valid and fully enforceable and had not been revoked by Dmitri Vail even though he had attorneys.

Motion to take possession of the trust corpus became thwarted when Judge Miller indicated that res judicata applied after having a New Trial wherein Nancy Vail wholly defaulted by not showing even though she was noticed by certified mail, phone, and process server. Nancy Vail as Executrix failed to appear and had no affirmative defenses pursuant to Texas Rules of Civil Procedure 94, thereby waiving defenses including res judicata specifically.

The Declaratory Judgment case involved Patricia Vail, wife No. 3, whose claim for 5 paintings obtained by divorce decree was only challenged by Nancy Vail, wife No. 4, and given severance as No. 91-4696-P3-A. The "Mother Hubbard" clause and "take nothing" clause do not apply to the Probate case, only the severed Declaratory Judgment case of Patricia Vail. res judicata does not apply in the estate case as all parties are not the same. *Lehmann v. Har-Con Corp.*, 39 SW3d at 205 indicates that an order that disposes of claims of only plaintiff does not adjudicate claims

by other parties . . . Nor does an order dispose of all claims and all parties merely because it is entitled "final."

Judge Miller trampled upon the Amendment XIV Equal Protection Clause, Texas Constitution Art. 1, Sec. 19, Trust Code 112.032, Texas Civil Procedure Rule 94 by denying this Petitioner equal protection of the laws as granted to others.

An appropriate Writ of Possession should be granted to this Petitioner.

REASONS FOR ALLOWANCE OF THE WRIT

1. Supporting withholding a Writ of Possession on trust property that has initially vested in the beneficiary in a passive irrevocable trust encourages radicalism in the law and actions. Conduct such as this violates the Equal Protection Clauses of Amendment XIV and Texas Constitution Art. 1, Sec. 19. Trust law affects both federal and state entities. This dangerous disarrangement of property and liberty may cause some to incite revolution. Forgetting the purpose of fairness in the laws, a government is likely to forget its own purpose and create dangers both to liberty and to justice.

2. Certiorari should be granted as each of the issues presented effect the property rights of citizens and their families. The issues presented strike at the heart and authority of the US Constitution and the

Texas Constitution and impacts the administration of justice and the public's perception of its fairness.

3. This Court should place controls on government and not allow *THEFT BY FIAT.*

4. Pursuant to Supreme Court Rule 10, the appeals court has decided important questions which conflict with relevant decisions of this Court dealing with trust laws, which involve this court's rulings and the Texas courts.

ARGUMENT

DID THE COURTS BELOW VIOLATE AMENDMENT XIV, SECTION 1 BY DENYING PETITIONER EQUAL PROTECTION OF THE LAWS OF TEXAS IN NOT GRANTING A WRIT OF POSSESSION FOR PAINTINGS AND PERSONALTY OF DMITRI VAIL PURSUANT TO HIS VALID *PASSIVE-TRUST* OF AUGUST 29, 1989, DECLARING THAT IN A SEVERED DECLARATORY JUDGMENT ACTION THAT SUCH "FINAL JUDGMENT" WAS RES JUDICATA IN THE PRIMARY ESTATE STATE?

The following should be particularly addressed:

1. The Dmitri Vail Trust is a *passive-trust*, and legal title vests in the beneficiary at the time the trust is created (App. 16).

2. Res judicata does not apply to the Estate Case, as an order that disposes of claims of only one

plaintiff (Patricia Ann Vail in her Declaratory Judgment severed "A" case where she was awarded ownership of 5 paintings) does not adjudicate claims by the other parties, and nor does an order dispose of all claims and all parties merely because it is entitled "final." *Lehmann v. Har-Con Corp.*, 39 SW3d 191, 205 (Tex. 2001).

Judge Loving in his Interlocutory Judgment (Clerk's Record 001-005) signed March 10, 1997, ORDERED, ADJUDGED AND DECREED that BERNARD J. DOLENZ owned in fee simple absolute:

a. All paintings and artwork of whatever kind and all rights and copyrights to artwork that were owned by Dmitri Vail on August 29, 1986; and

b. All furnishings, clothes, and personal effects that were owned by Dmitri Vail and located at his place of residence at 4245 Armstrong Parkway, Dallas, Texas 75205, on August 29, 1986.

Judge Loving in his "Final Judgment" in a severed Declaratory Judgment action (CR-001-008) by third wife Patricia Anne Vail, No. 91-4696-P/3(A), granted her 5 items of artwork stemming from her divorce degree, which only Nancy Vail contested. Judge Loving restates " . . . it was ORDERED that the Dmitri Vail Trust was valid and fully enforceable and Bernard J. Dolenz owned all of the property in the trust at the time Dmitri Vail died, in fee simple absolute . . . " Judge Loving also determined "that the

Dmitri Vail Trust was an *empty trust* at the time of Dmitri Vail's death, ..."

A *passive-trust* exists where a trustee is not given affirmative powers and duties, and such is also known as a *simple* or *dry* trust. Since legal title vests in the beneficiary at the time the trust is declared, the trust becomes empty at that time.

The Dmitri Vail at issue is a *passive-trust*, and title vests directly in the beneficiary per *Nolana Development Association v. Corsi*, 682 SW2d 246, 249 (Tex. 1984) which instructs:

> **If a trustee is not given affirmative powers and duties, the trust is "passive" or "dry" and legal title is vested in the beneficiaries, not the named trustee. (Multiple cites).**

This Court may take judicial notice that there are no affirmative powers and duties in Dmitri Vail's Declaration of Trust (CR-000-003, App. 23), and therefore the Dmitri Vail Trust is a *passive-trust*. This is old law and good law. See *Moore v. City of Waco*, 20 SW 61, 63 (Tex. 1892). *Lanius v. Fletcher*, 101 SW 1076 (Tex. 1907) instructs:

> **When a trustee has no duties to perform, the purposes of the trust having been accomplished, it becomes a simple, passive or dry trust, as it is termed in law, and the cestui que trust is entitled to have the full legal title and control of**

> **the property, because no other person has an interest in the property.**

Daniels v. Pecan Valley Ranch, Inc., 832 SW2d 372, 379 (Tex. App. – San Antonio 1992, writ denied) gives additional clarification:

> **A trustee who has no duty except to make payments as they become due is the trustee of a 'passive' or 'dry' trust. Under Texas law, a merely *passive-trust* cannot constitute a valid spendthrift trust because *the beneficiary is considered the real owner of the property. (Emphasis added.)***

Accordingly, the Trial Court erred in not releasing the paintings and other personality as requested since Petitioner should have full control of the personal property as a matter of law as no other person has an interest in the property.

THE RES JUDICATA ISSUE

Any claim against a party may be severed and proceeded with separately pursuant to TRCP 41, which was done here in the "A" case involving Patricia Anne Vail and her claim to paintings.

A "Final Judgment" was rendered reflecting the following: "On April 20, 1998, and April 22, 1998, the Court heard all the remaining issues to be decided ***in this matter*** for a final judgment to be entered." (CR-001 000010; App. 11). The issues were limited to the

Declaratory action regarding Patricia Vail's claim to her paintings granted to her by divorce degree. It did not cover the issues of attorney fees, the UCC filing, and obligations of the claims against the estate as sought in the estate case. Where issues linger in a separate action, further litigation may not be barred by res judicata as happened in *Van Dyke v. Boswell, et al.*, 697 SW2d 381 (Tex. 1985) [malpractice claim lingered over attorney's fees] and *S.O.C. Homeowners Ass'n v. City of Sachse,* 741 SW2d 542 (Tex. App. – Dallas 1987) [illegality of settlement agreement lingered]. Where one lawsuit is divided into separate parts, res judicata does not apply to prevent the second part of the lawsuit from going to trial after the first. *Van Dyke* at 384. In this case, the UCC financing statement and claims against the estate lingered.

Furthermore, the Court ordered a new trial in the Estate case. Executrix Nancy Vail, even though noticed of the trial, wholly failed to appear, did not answer the Request for Admissions, made no TRCP 94 affirmative defenses such as res judicata.

Evidence was given to the Court August 21, 2007 along with testimony (Reporter's Record). It was error for the Trial Court to raise any affirmative defense for the defaulted Executrix as it was not pled, and accordingly is waived *Texas Beef Cattle v. Green*, 921 SW2d 203, 212 (Tex. 1996). Had the Executrix pled res judicata as required by TRCP 94, the Final Judgment still would not dispose of all claims and all parties with "unmistakable clarity" per *Lehmann* at 205. Judge Miller's Order of October 5, 2007 (App. 8)

shows his glaring doubt when he expressed " . . . that the matter has already been (**or should have been**)" decided by the Final Judgment of August 12, 1998. (Emphasis added.) The "unmistakable clarity" problem is apparent in Judge Miller's order, and should there have been one, there still would be no res judicata affirmative defense in this case.

The Fifth Court of Appeals in *Dolenz v. Dallas Central Appraisal District*, No. 05-06-01110-CV (Feb. 11, 2007) instructs:

> When there has been no conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of all claims and parties or states with "unmistakable clarity" that it is a final judgment as to all claims and all parties. *Lehmann v. Har-Con Corp.*, 39 SW3d 191, 205 (Tex. 2001); *Straza v. Friedman, Drigert & Hsueh, L.L.C.*, 124 SW3d 404, 406 (Tex. App. – Dallas 2003, pet. denied). An order that disposes of claims of only one plaintiff does not adjudicate claims by other parties. *Lehmann,* 39 SW3d at 205. Nor does an order dispose of all claims and all parties merely because it is entitled "final." *Id.*

While the Trust corpus vests in beneficiary Bernard Dolenz pursuant to Judge Loving's Judgments, he is unable to obtain relief from the courts to obtain the possession, consequences of which is tantamount to Theft by Fiat, and which is repugnant and violates the Equal Protection Clauses of Amendment XIV, and

Texas Constitution Art. 1, Section 19. The Constitutional issues were brought before the Texas Supreme Court.

CONCLUSION

The drafters of the US Constitution created an instrument to guarantee equality to everyone under the law in Amendment XIV and sets a broad workable structure for operating a government fairly. This petitioner prays that this Honorable Court grant the writ of certiorari, remand the case back to the lower courts for a Writ of Possession of the Dmitri Vail corpus, and for such and other further relief to which this petitioner may be entitled.

Respectfully submitted,

BERNARD DOLENZ, pro se
#31480-077
6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220
bernarddolenz@att.net

AFFIRM; Opinion issued July 30, 2009

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-08-00034-CV

BERNARD DOLENZ, Appellant

V.

NANCY VAIL, EXECUTRIX OF THE DMITRI VAIL ESTATE, Appellee

On Appeal from the Probate Court No. 3
Dallas County, Texas
Trial Court Cause Nos.
91-4696-P3 and 91-4696-P3(A)

OPINION

Before Justices Bridges, FitzGerald, and Lang
Opinion By Justice Bridges

Bernard Dolenz appeals the trial court's order denying his "Second Motion to Take Possession" of certain paintings by Dmitri Vail. In three issues, Dolenz argues the trial court erred in denying his second motion to take possession and in ruling that he is bound by a prior judgment. We affirm the trial court's judgment.

For more than two decades, there has been a struggle for possession of the paintings and artwork of Dmitri Vail. In July 1989, Vail, a well-known portrait artist, met Dolenz when he came to Vail's home to view his artwork. Vail, who was in his seventies at the time, hired Dolenz to do some legal work for him. Vail believed his property was being mismanaged. Dolenz told Vail that NCNB Bank had breached its fiduciary duty, so in August of 1989, Dolenz set up a trust for Vail. The corpus of the trust consisted of all of Vail's paintings and artwork, all rights and copyrights to any of Vail's artwork, and all furnishings, clothes, and personal effects located at Vail's residence. The sole beneficiary of the trust was Dolenz. Dolenz's daughter, Brenda Lievrouw, notarized the trust instrument. Dolenz charged Vail $3000 to set up the trust.

Soon afterwards, in the fall of 1989, Vail executed four promissory notes payable to Dolenz. Dolenz testified the notes were for professional services in the amount of $92,374.93 and $3500 to Vail for living expenses. The notes were secured by the corpus of the above referenced trust. Dolenz assigned all four notes to his daughter. In March of 1990, while still representing Vail, Dolenz sent a series of demand letters on behalf of his daughter for payment of the notes. On April 12, 1990, Lievrouw and Dolenz went to Vail's house with a moving van to pick up the paintings that were collateral for the notes. Vail's wife called the police, and Lievrouw and Dolenz left without the paintings.

Also on April 12, 1990, Dolenz filed a motion to withdraw as Vail's counsel in the suit against NCNB Bank. But before the motion could be heard, Dolenz filed suit on behalf of his daughter Lievrouw in justice of the peace court. Vail filed a grievance on June 11, 1990 against Dolenz.[1] Vail died in December of 1991, and Nancy Vail, his widow, was appointed independent executrix of his will and estate. Dolenz brought a claim against the estate alleging that he had the legal right to paintings and personal property that were part of the inter vivos trust. In 1997, the probate court held that the Dmitri Vail Trust was a valid and fully enforceable trust. However, in 1998 the probate court also found that the trust was an "empty" trust at the time of Vail's death and ordered that Dolenz take nothing. Dolenz appealed the probate court's judgment to this Court. We dismissed the appeal when Dolenz failed to file an amended brief that satisfied the requirements of rule 38.1 of the rules of appellate procedure. The supreme court denied Dolenz's petition for discretionary review in 2000.

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[1] The complaint alleged that Dolenz committed several acts of professional misconduct when he represented Vail. In a subsequent disciplinary proceeding, a jury found that Dolenz, a licensed attorney at the time, violated several provisions of the Texas Code of Professional Responsibility and/or the Texas Disciplinary Rules of Professional Conduct by (1) improperly soliciting Vail's business; (2) entering into a prohibited business transaction with Vail; and (3) representing another person in a matter adverse to Vail. Dolenz was subsequently disbarred, and this Court affirmed the trial court's judgment disbarring Dolenz on November 7, 2001.

In 2002, Dolenz filed a petition for declaratory judgment in district court asking the court to hold that the final judgment from the probate court was void for lack of jurisdiction. Dolenz contended that district courts have exclusive jurisdiction over trust disputes. In 2003, the district court dismissed Dolenz's claim for lack of jurisdiction. In 2004, this Court held the probate court had jurisdiction over Dolenz's action involving the disposition of trust assets in the Dmitri Vail Trust, and the probate court's judgment was not void. Accordingly, this Court resolved Dolenz's issues against him.

In 2005, Dolenz filed in probate court his "Motion to Take Possession of All Paintings and Collateral Secured by Security Agreement from Dmitri Vail to Bernard Dolenz." The probate court denied Dolenz's motion on the basis that final judgment in the underlying case was entered August 12, 1998, that judgment decreed and made certain findings regarding art work by Vail, that judgment addressed the same issues as the motion to take possession, and that judgment was res judicata as to Dolenz's claims. The probate court thus concluded it lacked jurisdiction to consider Dolenz's motion to take possession because the matter had been appealed to this Court and ordered dismissed. On appeal, we concluded that, although collateral estoppel and res judicata might affect the merits of Dolenz's claim, they did not deprive the probate court of jurisdiction over the suit. We reversed the probate court's order dismissing Dolenz's motion to take possession and remanded the

case to the probate court for further proceedings. We expressly did not consider whether the probate court erred in finding the case was previously appealed and had a res judicata effect.

In 2006, Dolenz filed his "Second Motion to Take Possession of All Paintings and Collateral Secured by Security Agreement from Dmitri Vail to Bernard Dolenz" in which he again sought possession of certain of Vail's paintings. In October 2007, the probate court denied Dolenz's second motion to take possession. In the order, the probate court stated the August 12, 1998 final judgment determined the Dmitri Vail Trust was an "empty" trust and ordered Dolenz take nothing. The order concluded that Dolenz's claim was barred by res judicata. This appeal followed.

In three issues, Dolenz argues the trial court erred in denying his second motion to take possession, res judicata does not bar his claims, and he is not bound by the final judgment of August 12, 1998. Res judicata precludes relitigation of claims that have been finally adjudicated or that arise out of the same subject matter and that could have been litigated in the prior action. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996). It requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. *Id.* The policies behind the doctrine reflect the need to bring all litigation to an end, prevent

vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 629 (Tex. 1992). A court may take judicial notice of its own records and judgments, but the use to which such records may be put is circumscribed by the doctrines of res judicata and collateral estoppel. *Tex. Real Estate Comm'n v. Nagle,* 767 S.W.2d 691, 694 (Tex. 1989).

Here, the record contains the August 12, 1998 final judgment of Probate Court No. 3 ordering Dolenz take nothing on his claim for the property at issue. In the underlying proceeding, the judge of Probate Court No. 3 concluded the August 12, 1998 final judgment was entered in a lawsuit whose subject matter was the ownership and rights of possession of paintings by Vail. The final judgment decided Dolenz should take nothing on his claims, including (1) his claims based on an allegation that the paintings were not in the probate estate and (2) claims to the paintings pursuant to a UCC filing with the Secretary of State. The probate court's judgment concluded the relief requested by Dolenz in his second motion to take possession were barred by the doctrine of res judicata because the matter had "already been (or should have been) decided by the Final Judgment of August 12, 1998." Having reviewed the record and Dolenz's claims on appeal, it appears the elements of res judicata were satisfied in this case, and the probate court judge did not err in denying Dolenz's second

motion to take possession. *See Amstadt*, 919 S.W.2d at 652. We overrule Dolenz's issues.

We affirm the trial court's judgment.

/s/ David L. Bridges
DAVID L. BRIDGES
JUSTICE

080034F.P05

No. 91-4696-P3

ESTATE OF DMITRI VAIL, Deceased	)	IN THE PROBATE COURT
	)	NUMBER THREE OF
	)	DALLAS COUNTY, TX

ORDER DENYING SECOND MOTION TO TAKE POSSESSION

On October 11, 2006, Movant BERNARD DOLENZ filed his Second Motion to Take Possession of All Paintings and Collateral Secured by Security Agreement from Dmitri Vail to Bernard Dolenz;

And the court heard said Motion and ruled against the Movant and signed a judgment to that effect on June 1, 2007, and Movant BERNARD DOLENZ filed his Motion to Reconsider Order of June 1, 2007, which he filed on June 12, 2007, and which the Court granted on July 30, 2007; and which Second Motion to Take Possession was then heard on August 21, 2007;

And and it appearing to the Court that the following facts, events, are true, to-wit:

1. That on August 12, 1998, the Court signed an order entitled Final Judgment, which cause number was No. 91-4696-P3(A), styled "Patricia Anne Vail vs. Nancy Vail, Independent Executrix of the Estate of Dmitri Vail, Deceased, Bernard J. Dolenz, and Brenda J. Lievrouw;

2. That BERNARD DOLENZ filed an answer in said cause of action on or about March 2, 1992,

entitled "Answer To Patricia Vail's Original Petition For Declaratory Relief, Injunction and Damages; Motion To Vacate February 28, 1992 Order; and Bernard J. Dolenz's Counter-claim for Declaratory Relief;

3. That the subject matter of the lawsuit was the ownership and rights of possession to various paintings painted by Decedent DMITRI VAIL, which paintings either belong to the Estate, as claimed by Plaintiffs, or did not belong to the Estate, but instead belonged to a trust, the beneficiary and trustee of which was BERNARD DOLENZ, as claimed by Movant BERNARD DOLENZ;

4. That the Final Judgment decided in part that the Dmitri Vail Trust was an empty trust but that BERNARD J. DOLENZ owned in fee simple all property contained therein; that "Defendant/ Cross-Defendant BERNARD J. DOLENZ take nothing" as to any other claim, one claim of which was that the paintings were allegedly not in the probate estate, another of which was the right of litigant Brenda Lievrouw's "rights as to her collateral interest in the paintings and her right to have that collateral pursuant to the UCC filing with the Secretary of State."

That despite service on default by NANCY VAIL of the Motion, the Court is of the opinion that the relief requested by BERNARD DOLENZ is barred by the doctrine of *res judicata*, and that the matter has already been (or should have been) decided by the Final Judgment of August 12, 1998;

THEREFORE Movant's Second Motion to Take Possession of All Paintings and Collateral Secured by Security Agreement from Dmitri Vail to Bernard Dolenz, should be and is hereby DENIED.

SIGNED this the 5th day of October, 2007

/s/ Joe Miller
JUDGE PRESIDING

NO. 91-4696-P/3(A)

PATRICIA ANNE VAIL	§	IN THE PROBATE
VS.	§	COURT
	§	
NANCY VAIL, INDEPENDENT EXECUTRIX OF THE ESTATE OF DMITRI VAIL, DECEASED, BERNARD J. DOLENZ, AND BRENDA J. LIEVROUW	§	NUMBER THREE OF
	§	
	§	DALLAS COUNTY, TEXAS
	§	
	§	
	§	

FINAL JUDGMENT

The Court has been advised the parties in this cause have settled all claims by and against Plaintiff Patricia [Anne /s/ JL] Vail and they agree to the entry of this Judgment. The Court is of the opinion a Judgment on these claims is appropriate and should be granted.

It is, therefore, ORDERED, ADJUDGED AND DECREED that Patricia [Anne /s/ JL] Vail owns all right, title and interest in the following original artwork by Dmitri Vail:

1. Easter Sunday;
2. Supplication;
3. E. B. Stewart "Benty";
4. Agnes Moorhead;
5. Sportatorium

IT IS FURTHER ORDERED that the Executrix of this Estate, to the extent that she acquires possession of the above-described artwork, and all persons in possession of the above-described artwork shall deliver same to Patricia [Anne /s/ JL] Vail immediately.

IT IS FURTHER ORDERED that Patricia [Anne /s/ JL] Vail shall have no right, title or interest in the property described in Exhibits A and B attached hereto except for the above-mentioned artwork and the following artwork which is in her possession:

1. Turtle Creek in Springtime (small);
2. Street Scene (painting done in Nassau);
3. Camellia oil paintings;
4. Two (2) Turtle Creek oil paintings; and
5. Camellia prints.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims by and all claims against Patricia [Anne /s/ JL] Vail in this cause are hereby dismissed with prejudice.

On April 16, 1997, by Amended Interlocutory Summary Judgment, the Motion for Summary Judgment Pursuant to Mediation Agreement filed by Bernard J. Dolenz on October 16, 1996, was granted, in part, and denied, in part. More specifically, the Motion was granted in part pursuant to the Uniform Declaratory Judgments Act, and it was ORDERED that the Dmitri Vail Trust was valid and fully

enforceable and Bernard J. Dolenz owned all of the property in the trust at the time Dmitri Vail died, in fee simple absolute, and the Motion was denied in part as it was ORDERED all other relief requested was denied.

On April 16, 1997, it was also ORDERED that the Defendant's Cross-Motion for Summary Judgment Pursuant to Mediation Agreement Dated October 2, 1996, filed by Nancy Vail, Independent Executrix of the Estate of Dmitri Vail, Deceased on October 17, 1996, be denied.

On March 19, 1998, by Partial Summary Judgment the Court determined the Executrix was entitled to summary judgment that the Dmitri Vail Trust was an empty trust a[t /s/ JL] the time of Dmitri Vail's death, and ORDERED that Executrix Nancy Vail's Second Motion for Partial Summary Judgment be granted.

At the pre-trial hearing on April 2, 1998, the Defendant/Cross-Defendant Bernard J. Dolenz in open court expressly waived his claim to attorneys' fees and also waived his claim to attorneys' fees by failing to submit appropriate issues to the Court, as previously ordered by the Court.

On April 20, 1998, and April 22, 1998, the Court heard all the remaining issues to be decided in this matter for a final judgment to be entered. Defendant/Cross-Plaintiff Nancy Vail appeared through her counsel. Defendant/Cross-Defendant Bernard J. Dolenz appeared in person and through his counsel.

Defendant Brenda J. Lievrouw, though duly notified of the trial setting, failed to appear. After examining the remaining pleadings, listening to the evidence, and hearing the argument of counsel, the Court held the following should be ordered:

It is ORDERED, ADJUDGED, and DECREED that the Defendant/Cross-Defendant Bernard J. Dolenz take nothing;

It is further ORDERED, ADJUDGED and DECREED that the Defendant Brenda J. Lievroux shall be bound by all previous orders of this Court and any affirmative claims she may have or could have presented in this matter are dismissed with prejudice for want of prosecution;

It is further ORDERED, ADJUDGED, and DECREED that the Defendant/Cross-Plaintiff Nancy Vail is awarded attorneys' fees pursuant to the Declaratory Judgment Act from the Defendant/Cross-Defendant Bernard J. Dolenz as follows:

1. $24,596.50 through trial;

2. $6,000 should this matter be appealed to the Court of Appeals and should the Defendant/ Cross-Plaintiff Nancy Vail be successful in said appeal;

3. $4,500 should a Petition for Review be filed by the Defendant/Cross-Defendant Bernard J. Dolenz and denied by the Texas Supreme Court;

4. $3,500 should the Texas Supreme Court grant oral argument on the Petition for Review and should the Defendant/Cross-Plaintiff Nancy Vail be successful on the Texas Supreme Court Appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment shall bear interest at the rate of 10% from the date of this judgment until paid.

The Court further ORDERS execution to issue for this Judgment.

The Court DENIES all relief not expressly granted in this Judgment.

All costs are the responsibility of the party incurring same.

SIGNED this 12 day of August, 1998.

/s/ Joe Miller
JUDGE PRESIDING

CAUSE NO. 91-4696-P/3(A)

PATRICIA ANNE VAIL VS. NANCY VAIL, INDEPENDENT EXECUTRIX OF THE ESTATE OF DMITRI VAIL, DECEASED, BERNARD J. DOLENZ, and BRENDA J. LIEVROUW	§	IN THE PROBATE COURT NUMBER THREE OF DALLAS COUNTY, TEXAS

NO. 91-4696-P/3

ESTATE OF DMITRI VAIL, DECEASED	§	IN THE PROBATE COURT NUMBER THREE OF DALLAS COUNTY, TEXAS

INTERLOCUTORY JUDGMENT

On December 12, 1996, the Court heard the Motion for Summary Judgment Pursuant to Mediation Agreement that BERNARD J. DOLENZ filed on October 16, 1996, and the Defendant's Cross-Motion for Summary Judgment Pursuant to Mediation Agreement Dated October 2, 1996, that counsel for NANCY VAIL, INDEPENDENT EXECUTRIX OF THE ESTATE OF DMITRI VAIL, DECEASED filed on October 17, 1996.

At the above-referenced hearing, BERNARD J. DOLENZ appeared in person and by and through his

counsel, Jack Thomas Jamison, and NANCY VAIL, INDEPENDENT EXECUTRIX OF THE ESTATE OF DMITRI VAIL, DECEASED appeared by and through her counsel, G. Ward Beaudry and Alfred W. Ellis.

After considering the above-referenced motions, the summary judgment evidence, and the responses and objections to motions and the evidence, the Court found that there was no genuine issue as to the following facts:

(1) Dmitri Vail created a trust on August 29, 1989, through the execution of a Declaration of Trust that same day;

(2) Dmitri Vail, as settlor, placed the following items of property into the trust on August 29, 1986, for use and benefit of BERNARD J. DOLENZ:

a. All of Dmitri Vail's paintings and art-work of whatever kind;

b. All of Dmitri Vail's rights and copyrights to all of Dmitri Vail's artwork; and

c. All of Dmitri Vail's furnishings, clothes, and personal effects that were then located at his place of residence at 4245 Armstrong Parkway, Dallas, Texas 75205;

(3) The trust provided that Dmitri Vail was the trustee of that trust;

(4) The trust provided that the trust was binding upon Dmitri Vail's heirs, executors, administrators, and assigns;

(5) The trust provided that in the event of Dmitri Vail's death, BERNARD J. DOLENZ became the successor trustee of the trust, BERNARD T. DOLENZ was to then transfer all of the above-referenced property and all right and title to and interest in the property to himself in fee simple absolute, and the trust would thereby terminate;

(6) Dmitri Vail died on December 23, 1991, and he did not, in any way, amend or revoke the trust prior to his death; and

(7) The trust is valid and fully enforceable.

It is therefore, ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment Pursuant to Mediation Agreement that BERNARD J. DOLENZ filed on October 16, 1996, is granted, in part, and the Defendant's Cross-Motion for Summary Judgment Pursuant to Mediation Agreement Dated October 2, 1996, that counsel for NANCY VAIL, INDEPENDENT EXECUTRIX OF THE ESTATE OF DMITRI VAIL, DECEASED filed on October 17, 1996, is denied. More specifically, pursuant to the Uniform Declaratory Judgments Act, it is ORDERED, ADJUDGED AND DECREED that BERNARD J. DOLENZ owns the following property in fee simple absolute:

a. All paintings and artwork of whatever kind and all rights and copyrights to artwork that were owned by Dmitri Vail on August 29, 1986; and

b. All furnishings, clothes, and personal effects that were owned by Dmitri Vail and located at his place of residence at 4245 Armstrong Parkway, Dallas, Texas, 75205, on August 29, 1986.

Signed this 10 day of March, 1997.

/s/ Joe Loving
Judge Presiding

Order issued September 3, 2009

[SEAL]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-08-00034-CV

BERNARD DOLENZ, Appellant

V.

NANCY VAIL, EXECUTRIX OF THE DMITRI VAIL ESTATE, Appellee

ORDER

Before Justices Bridges, FitzGerald, and Lang

Appellant's August 6, 2009 Motion for Rehearing is **DENIED**.

/s/ David L. Bridges
DAVID L. BRIDGES
JUSTICE

[SEAL]
OFFICIAL NOTICE FROM
THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 09-0810 DATE: 12/4/2009
COA #: 05-08-00034-CV TC#: 91-4696-P3

STYLE: BERNARD DOLENZ V.
NANCY VAIL, EXECUTRIX OF
THE DMITRI VAIL ESTATE

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO: MR. BERNARD DOLENZ
6102 SWISS AVE
DALLAS TX 75214

[SEAL]
OFFICIAL NOTICE FROM
THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 09-0810 DATE: 1/22/2010
COA #: 05-08-00034-CV TC#: 91-4696-P3

STYLE: BERNARD DOLENZ V.
NANCY VAIL, EXECUTRIX OF
THE DMITRI VAIL ESTATE

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MAIL TO: MR. BERNARD DOLENZ
6102 SWISS AVE
DALLAS TX 75214

Declaration of Trust

WHEREAS, I, DMITRI VAIL, 4245 Armstrong Parkway, Dallas, TX 75205, of the City/~~Town~~ of Dallas, County of Dallas, State of Texas, am the sole owner of the following articles of personal property:

> All of my paintings and artwork of whatever kind situated at 4245 Armstrong Parkway, Dallas, TX 75205; the GALLERY at Norman, OK; paintings on consignment to Jean LoMonaco, Richmond, KY; the Best Western LeBaron Hotel, 1055 Regal Row, Dallas, TX; area restaurants in Dallas, TX, among other places.
>
> All rights and copyrights to any of my artwork.
>
> All furnishings, clothes, and personal effects located at my residence at 4245 Armstrong Parkway, Dallas, TX 75205.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that I do hereby acknowledge and declare that I hold and will hold said articles of personal property and all my right, title and interest in and to said articles IN TRUST

1. For the use and benefit of:

(Name) Bernard J. Dolenz of the DMITRI VAIL TRUST, of

(Address) 6102 Swiss Avenue, Dallas, TX 75214

Number Street City State Zip

or, if such beneficiary be not surviving, for the use and benefit of:

(Name) ~~Sue Hamilton of the DMITRI VAIL TRUST~~
[/s/ B.D. Dmitri Vail], of
(Address) ~~226 Shockley DeSoto TX 75115~~
Number Street City State Zip

If because of my physical or mental incapacity certified in writing by a physician, the Successor Trustee hereinafter named shall assume active administration of this trust during my lifetime, such Successor Trustee shall be fully authorized, if the need should arise, to dispose of all or any part of the trust property and to pay to me or disburse on my behalf from the proceeds such sums from income or principal as appear necessary or desirable for my comfort or welfare. Upon my death, unless both beneficiaries shall predecease me or unless we all shall die as a result of a common accident, my Successor Trustee is hereby directed forthwith to transfer said trust and property and all my right, title and interest in and to said trust property unto the beneficiary absolutely and thereby terminate this trust.

If any property covered by this instrument shall, at the time of my death, be physically situated within a residence which has been covered by a separate Declaration of Trust, which provides that such residence and all furniture, fixtures and personal effects contained therein are being held by me in trust for a beneficiary or beneficiaries other than the ones or ones named herein, then in such circumstance this instrument shall be deemed to constitute a revocation

of such other Declaration of Trust to the extent *only* of the specific item of property being here placed in trust, and, with respect to this specific item alone, the dispositive provisions of this trust shall supersede those of the aforesaid Declaration of Trust covering such residence.

2. All interests of a beneficiary hereunder shall be inalienable and free from anticipation, assignment, attachment, pledge or control by creditors or a present or former spouse of such beneficiary in any proceedings at law or in equity.

3. I reserve unto myself the power and right at any time during my lifetime to amend or revoke in whole or in part the trust hereby created without the necessity of obtaining the consent of any beneficiary and without giving notice to any beneficiary. The sale or other disposition by me of the whole or any part of the trust property held hereunder shall constitute as to such whole or part a revocation of this trust.

4. The death during my lifetime, or in a common accident or disaster with me, of both of the beneficiaries designated hereunder shall revoke such designation, and in the former event, I reserve the right to designate a new beneficiary. Should I for any reason fail to designate such new beneficiary, this trust shall terminate upon my death and the trust property shall revert to my estate.

5. In the event of my physical or mental incapacity or my death, I hereby nominate and appoint as Successor Trustee hereunder whosoever shall at that

time be beneficiary hereunder, unless such beneficiary shall not have attained the age of 21 years or is otherwise legally incapacitated, in which event I hereby nominate and appoint

(Name) ~~Mickey~~ Mickie LYNN POKACHAIPATT, of
(Address) 226 Shockley DeSoto TX 75115
Number Street City State Zip

to be Successor Trustee.

6. This Declaration of Trust shall extend to and be binding upon the heirs, executors, administrators and assigns of the undersigned and upon the Successors to the Trustee.

7. The Trustee and his successors shall serve without bond.

8. This Declaration of Trust shall be construed and enforced in accordance with the laws of the State of Texas.

IN WITNESS WHEREOF, I have hereunder set my hand and seal this 29th day of August, 1989.

(Settlor sign here) Dmitri Vail L.S.

~~I, the undersigned legal spouse of the above Settlor, hereby waive all community property rights which I may have in the hereinabove-described personal effects and give my assent to the provisions of the trust and to the inclusion in it of the said personal effects.~~

~~*(Spouse sign here)* L.S.~~

Witness: (1) Caroline Berthelot

Witness: (2) _____

STATE OF TEXAS)
COUNTY OF DALLAS) City or Town Dallas

On the 29th day of August, 1989, personally appeared DMITRI VAIL known to me to be the individual(s) who executed the foregoing instrument, and acknowledged the same to be his free act and deed, before me.

/s/ Brenda J. Dolenz
Notary Public

(Notary Seal)

Brenda J. Dolenz
My Commission Expires
12/06/89